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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINALD HOWARD,

Defendant and Appellant.

B186175

(Los Angeles County
Super. Ct. No. BA240172)

APPEAL from a judgment of the Superior Court of Los Angeles County,
William R. Pounders, Judge. Affirmed as modified.

Peter Gold, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney
General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters, Lawrence
M. Daniels, Margaret M. Maxwell and Susan Sullivan Pithey, Deputy Attorneys General,
for Plaintiff and Respondent.

Defendant and appellant, Reginald Howard, appeals from the judgment entered following his conviction, by jury trial, for special circumstance first degree murder and robbery, with firearm and gang enhancements (Pen. Code, §§ 187, 190.2, subd. (a)(17), 211, 12022, 12022.53, 186.22).¹ Sentenced to state prison for life without possibility of parole plus 25 years to life, Howard claims there was trial and sentencing error.

The judgment is affirmed as modified.

BACKGROUND

1. Prosecution evidence.

a. The Big Saver robbery.

On November 3, 1998, defendant Howard along with Claudell Hatter, Jesse Singleton, Rollin Denem, Wardell Joe, Tiasha Croslin and Thomas Bridges robbed a Big Saver Foods Market (“Big Saver”) in Los Angeles.² Howard, Hatter, Singleton, Denem and Joe were members of the 69 East Coast Crips. Bridges belonged to the West Covina Neighborhood Crips, and his girlfriend Croslin used to belong to a gang in San Diego.

Gilbert D. lived close to the Big Saver. On November 3, 1998, three cars stopped in front of his house and he watched the occupants talking together for a few minutes. One of the cars was a blue and tan Regal. It looked to Gilbert like the occupants of the cars were plotting something. As he watched, three men got out of one of the cars and walked toward the Big Saver. The cars departed, but one quickly parked again nearby. When Gilbert walked down the street, the man inside this car avoided Gilbert’s gaze in an apparent attempt to conceal his identity. Another one of the three cars then pulled up. Gilbert walked back home and called 911 because he thought the people in the cars were planning to rob him. He watched as four men went into the Big Saver. Shortly thereafter, he saw two or three people run out of the Big Saver, jump in one of the cars and drive off. In May 2001, police showed Gilbert photo arrays. He identified the two

¹ All further statutory references are to the Penal Code unless otherwise specified.

² Amar Mobley was acquitted of having participated in the Big Saver robbery.

occupants of the Regal as Hatter and Croslin: Hatter had been driving and Croslin had been sitting in the passenger seat.

Jose L., the assistant manager at Big Saver, was stocking shelves when he noticed three men inside the store. Jose got suspicious because he saw the men wandering around the store without picking out any items to buy. At one point, the men stopped and had a conversation less than 10 feet away from Jose and he was able to see their faces. Jose then went to the upstairs warehouse and watched the men from above. He lost sight of them as they moved toward the front of the store. After hearing a gunshot, he went back downstairs and saw one of the men who had been roaming the store. This man was standing behind Marissa, one of the cashiers, and pointing a gun at her head.

In April 2001, police showed Jose a photo array and he identified Howard as one of the three men he had seen roaming around the market that day. At the trial, which took place a little more than seven years after the robbery, Jose was asked if he saw any of those men in the courtroom. Howard was being tried with two codefendants. Jose replied, “It’s been a very long time. I couldn’t tell you exactly.” Asked the same question a little later during his testimony, Jose said Howard “seems familiar.”³

Marissa A. testified she heard another cashier yell for the security guard. Looking toward the front of the store, Marissa saw two men struggling with Jose Hernandez, the security guard. A third man was standing in front of Hernandez and pointing a gun at him. Marissa heard a gunshot and ran to the manager’s office, but the manager locked the door before she could get inside. Then one of the men who had been struggling with Hernandez yelled at Marissa. When she turned around, the man was pointing a gun at her. Marissa returned to her cash register, where the man ordered her to hand over the

³ When Jose was asked why he had initially been unsure, the following colloquy occurred: “A. When you asked me the question the first time, it seemed so but I wasn’t sure. [¶] Q. What happened that made you feel more sure? [¶] A. I don’t know. It just seems to me that I’ve seen him before, that’s why. I don’t know if it was perhaps in the picture as well.” Jose further explained: “At the moment when the question was

money. Because it was still early in the day, the robbers did not get more than three or four hundred dollars and some food stamps. As Marissa was emptying the register, she saw Hernandez “on the floor” and she thought he had been shot.

b. The initial 1998 investigation.

Los Angeles County Sheriff’s Detective Joseph Martinez arrived at the scene shortly after the shooting. He found Hernandez dead, lying on the floor in front of a magazine rack. Hernandez’s gun was missing. His shirt, which had been removed by paramedics, had a gunshot hole just below the left breast pocket. Martinez found a hole in the magazine rack and an expended .45-caliber bullet between some magazines. He also found a bullet hole in the ceiling near one of the cash registers.

James Carroll, a forensic firearms examiner, testified the bullet recovered from the magazine rack was a .45-caliber bullet that had probably been fired from a semiautomatic weapon. Hernandez owned a .380-caliber gun which could not have fired the .45-caliber bullet. Carroll found black sooting around the bullet hole in Hernandez’s shirt, indicating the murder weapon had been pressed right up against Hernandez’s body when it was fired.

The investigation made no further progress for several years.

c. The investigation resumed in 2001.

Leonard Jackson was a member of the 76 East Coast Crips. He was acquainted with the people who committed the Big Saver robbery. He frequently hung out with them at Hatter’s house on 84th Street.⁴ Two days after the Big Saver robbery, Jackson was arrested for violating parole. He had been in federal custody since March 2000.

In October 2000, Jackson was given a 17-year prison sentence on a federal drug case. Hoping to get this sentence reduced, he told the United States Attorney in Los Angeles he had information about the Big Saver murder. Jackson was initially

asked of me, I didn’t want to say yes, but he did look familiar,” and “I felt he was one of the people I had seen inside the store.”

⁴ The house belonged to Hatter’s aunt, but it will be referred to as “Hatter’s house” for convenience.

interviewed by Los Angeles Police Dept. Detective Gregory McKnight, who was investigating another case, a March 2001 drive-by gang shooting in which Howard was a suspect. When Jackson made statements about the Big Saver case, McKnight contacted Detective Martinez, who had been conducting the Big Saver investigation. Based on identifications made by Jackson, Martinez began showing photo arrays to various eyewitnesses.

McKnight arrested Howard in April 2001, in connection with the drive-by shooting. Under interrogation, he began to incriminate himself in the Big Saver case after McKnight falsely said Singleton had implicated him.⁵ McKnight contacted Martinez, who asked him to start taping the interview. On the recording, Howard admitted his participation in the Big Saver robbery. He said someone had given him an inoperable firearm to wave around during the robbery and that he was supposed to get money from the safe in the manager's office. He saw Singleton and Joe fighting with the security guard; one of them shot the guard.

After arriving at the police station, Martinez took over the questioning. When he said he was investigating the Big Saver case, Howard said he didn't want to talk about that. As Martinez got up to leave, Howard asked if Martinez would "mind telling him what I had on him." Shown the photographs that had been identified by Jackson, Howard remarked, "It looks like you've done your job." Howard then asked "who was talking[?]" Martinez falsely told him it was Croslin, to which Howard responded, "Can't trust no bitch." When Martinez again asked if Howard wanted to make a statement, Howard said, "[W]ell, with what I had on him and with what McKnight had on him, he was looking at life in prison, so he asked . . . to call his mother, get some advice from his mother." After the call, Howard refused to say anything else.

⁵ Regarding the drive-by shooting, McKnight falsely told Howard his fingerprint had been found on the suspected drive-by vehicle, and that Singleton had implicated him.

d. *Croslin's trial testimony.*

Croslin testified that in November 1998, she was living with her boyfriend Thomas Bridges in Los Angeles. Croslin previously lived in San Diego, where she had been a member of Emerald Hills, a Blood gang. Bridges was a member of the West Covina Neighborhood Crips. He frequently hung out with members of the 69 East Coast Crips at Hatter's house on 84th Street. Croslin and Bridges lived on 68th Street. Their friend Leonard Jackson lived in a house right in front of them.

On the day of the Big Saver robbery, Croslin and Bridges went to Hatter's house. Howard, Hatter, Singleton, Denem, Joe and Amar Mobley were also there. Croslin heard them planning a robbery. The plan was to use three cars. Bridges told Croslin to ride with Hatter in the blue and tan Regal. The three cars left Hatter's house at the same time. Croslin and Hatter drove to a Big Saver market and went inside "[t]o scope the place out." They bought a few items and left. As they drove away, Croslin saw the other two cars parked on a street near the Big Saver. She could see the other members of the robbery group, including Howard. Hatter then parked the Regal out of sight of the Big Saver. He and Croslin sat there a few minutes, then drove past the Big Saver again. Croslin saw "[p]eople running out of the store," "covering their faces and running."

All the Big Saver participants met back at Hatter's house. People started arguing because someone had gotten shot during the robbery. Howard was pacing nervously, saying, "I shot him," and "I killed him, I killed him." Hatter told Howard to shut up. Hatter said, "You didn't kill him, you didn't kill him." People were also complaining because the robbery proceeds were so meager. Croslin saw Leonard Jackson arrive in a car being driven by his girlfriend. Croslin left shortly thereafter and went home.

That night, Croslin saw a report about the Big Saver robbery on the news. Police sketches of Denem and Bridges were shown. Croslin got upset when she learned the security guard had been killed. When Bridges came home, he had money and food stamps from the robbery. Croslin confronted him about the guard's death. Bridges said he and Denem were supposed to open the safe while Howard and Singleton robbed the cash registers, but that an employee locked the office door so Bridges and Denem went to

the cash registers. Bridges saw Howard and Singleton “tussling with the security guard.” A gun went off, but Bridges did not see who fired it.

Croslin was arrested two days later in a bank robbery and she had been in federal custody ever since. She agreed to testify against her Big Saver accomplices in return for a guilty plea to manslaughter and robbery. Detective Martinez interviewed Croslin in Connecticut in May 2001, after which she was brought to Los Angeles.

In her testimony, Croslin admitted having written letters to Hatter and Bridges’s mother apologizing for falsely implicating Bridges and Hatter in the Big Saver robbery. Croslin wrote she had done so because the police threatened her. She was subsequently interviewed by Hatter’s investigator, who prepared a statement that she signed asserting she had been the victim of police coercion. However, Croslin testified the letters she had written to Hatter and Bridges’s mother were false. Bridges’s mother had been visiting Croslin in jail and harassing her, telling her not to testify. Hatter had threatened her when they happened to be on the same prison bus: “He told me to don’t say anything else, this is a capital murder case, we’re looking at the death penalty and just shut up and be quiet.” Croslin wrote the apology letters to stop this harassment. The statement she signed for the defense investigator was untrue; she had never been pressured to make statements against the defendants.

e. Jackson’s trial testimony.

Jackson testified that on November 3, 1998, he went to Hatter’s house. Because he was wanted for a parole violation, Jackson had his girlfriend drive him while he hid in the back seat of the car. When they arrived, Jackson sat up and saw three cars drive up. He saw Hatter, Singleton, Mobley, Denem, Joe, Croslin, Bridges and Howard go into Hatter’s house. When Jackson walked into the house, he saw Howard and the others discussing the robbery and dividing up food stamps. Hatter said, “Man, how much money you all got. This is all you all got?”, to which Bridges relied, “We would have got more if [Howard] wasn’t so damn trigger happy.” Jackson testified Howard was “stressed out” and “pacing back and forth” during this conversation. Howard appeared to have something heavy in his pocket which might have been a gun.

Later that day, after Howard left, Jackson remained at Hatter's house. He was watching television with Bridges and Denem when a news report came on about the Big Saver robbery. Bridges and Denem said it "was messed up" "how the killings [*sic*] went down . . . saying that [if Howard hadn't been] trigger happy . . . the killing wouldn't have went down."

In March 2000, while Jackson was in federal custody, he ran into Bridges. Bridges started talking about the Big Saver robbery. He said there was "never supposed to [have] been a murder," but that Howard "was real trigger happy. [Howard] shot and killed the officer in the store." Bridges described how the robbery unfolded. After Croslin and Hatter cased the market, Howard, Singleton, Denem and Bridges went in. Singleton and Howard were armed and they were supposed to rob the security guard. When the guard tried to take Singleton's gun, Howard shot him. However, Jackson also testified that Bridges admitted he had not actually witnessed the shooting: "[Bridges] said he heard . . . a gunshot and he ran to the front [of the store]. He said when he ran to the front, [Singleton] and [Howard] had already run up out the door. [¶] Q. Could he see what was happening with the security guard? [¶] A. Naw."

The prosecution's gang expert testified that in 1998 the 69 East Coast Crips had about 130 members. Their principal enterprises included murder, robbery, drive-by shootings, drug sales and weapons sales. When these gang members committed robberies in their own territory, they did so in order to obtain money to buy drugs, weapons and vehicles. Howard had identified himself as a member of the 69 East Coast Crips to several police officers.

2. Defense evidence.

Hatter's investigator, Stephen Thornton, visited Croslin at the county jail in response to the letter she had written to Hatter. Croslin told Thornton her police statements had been coerced, that Detective Martinez said she would go to prison for the rest of her life and never see her mother again. Martinez played her a tape of his interview with Jackson, and Croslin just repeated what Jackson said. Thornton later brought Croslin a written statement describing this police coercion, which she signed.

3. *Proceedings*

Codefendants Mobley and Singleton were tried with Howard in a single proceeding, but they had a separate jury. Howard was convicted of having participated in the Big Saver robbery. Mobley was acquitted and Singleton was retried following a mistrial. The charges against Howard arising out of the 2001 drive-by shooting were dismissed by the trial court following a mistrial. Hatter, Joe, Denem and Bridges had been tried and convicted for the Big Saver robbery at an earlier trial.⁶

CONTENTIONS

1. The trial court erred by denying a *Pitchess* motion.
2. The trial court erred by admitting evidence of certain hearsay declarations.
3. Howard's sentence of life without possibility of parole constitutes cruel and unusual punishment.
4. Howard's sentence violated the rule of *Apprendi/Blakely*.
5. The trial court erred by imposing a parole revocation fine.

DISCUSSION

1. *Any error in denying the Pitchess motion was harmless.*

Howard contends the trial court prejudicially erred by denying his motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, for discovery of the interrogating detectives' personnel files of the detectives who interrogated him. This claim is meritless.

a. *Legal principles.*

"Evidence Code sections 1043 and 1045, which codified our decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 . . . , allow discovery of certain relevant information in peace officer personnel records on a showing of good cause. Discovery is

⁶ All the people convicted in the Big Saver case, except for Croslin, were sentenced to life without possibility of parole plus 25 years to life. Croslin, who testified against her accomplices, pled no contest to robbery and voluntary manslaughter and received a 12-year prison sentence.

a two-step process. First, defendant must file a motion supported by declarations showing good cause for discovery and materiality to the pending case. [Citation.] This court has held that the good cause requirement embodies a ‘relatively low threshold’ for discovery and the supporting declaration may include allegations based on ‘information and belief.’ [Citation.] Once the defense has established good cause, the court is required to conduct an in camera review of the records to determine what, if any, information should be disclosed to the defense. (Evid. Code, § 1045, subd. (b).) The statutory scheme balances two directly conflicting interests: the peace officer’s claim to confidentiality and the defendant’s compelling interest in all information pertinent to the defense. [Citation.]” (*People v. Samuels* (2005) 36 Cal.4th 96, 109.)

The good cause showing under Evidence Code section 1043 requires a “specific factual scenario” establishing a “plausible factual foundation” for the allegations of police misconduct. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85, 86.) “[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of *specific police misconduct* that is both internally consistent and supports the defense proposed to the charges.” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1026, italics added.)

“Ultimately, whether a motion to discover police personnel records has been supported by an affidavit sufficient to show good cause and materiality . . . is a factual determination made by the court in its sound discretion. [Citation.]” (*City of Los Angeles v. Superior Court* (2002) 96 Cal.App.4th 255, 260.) Even if the trial court erroneously denies a *Pitchess* motion, reversal is not required unless the defendant can demonstrate prejudice. (See *People v. Samuels, supra*, 36 Cal.4th at p. 110 [“[E]ven if the trial court erred because defendant made a showing of good cause in support of his [*Pitchess*] request . . . , such error was harmless [under *Watson*].”⁷]; *People v. Memro*

⁷ *People v. Watson* (1956) 46 Cal.2d 818.

(1985) 38 Cal.3d 658, 684 [“It is settled that an accused must demonstrate that prejudice resulted from a trial court’s error in denying discovery.”].)

b. *Howard’s Pitchess motion.*

In boilerplate fashion, Howard filed a *Pitchess* motion asking for information “relating to acts of aggressive behavior, violence, excessive force, . . . racial bias, gender bias, ethnic bias, sexual orientation, coercive conduct, [and] violation of constitutional rights.” The motion also sought: “All complaints from any and all sources of officer misconduct amounting to moral turpitude . . . , including but not limited to allegations of false arrest, planting evidence, fabrication of police reports, falsified [*sic*] a *Miranda* warning, or fabricated [*sic*] a confession or admission, fabrication of probable cause, false testimony, perjury, using excessive force, making false arrests, writing false police reports to cover up the use of excessive force, and false or misleading internal reports including but not limited to false overtime or medical reports.”

Defense counsel’s supporting declaration asserted, on information and belief, that Howard’s statements to police had been “induced by threats of life imprisonment and false promises of leniency if [he] cooperated with the investigation. [¶] One of the likely issues at trial will be whether Mr. Howard made any statements to [the investigating officers] voluntarily or whether these officers failed to respect Mr. Howard’s request to invoke his Fifth Amendment right not to speak to them⁸ and/or failed to report further interrogative techniques used on Mr. Howard, such as force, threat of force, aggressive behavior toward Mr. Howard, or promises of false leniency.” Noting that Howard is black and a gang member, defense counsel sought evidence showing the investigating officers were racist or biased against gangs. Defense counsel also complained the interrogation had been taped without Howard’s knowledge and that the tape had started in mid-conversation.

⁸ Defense counsel’s declaration alleged a series of *Miranda* violations. (See *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].)

c. *The Pitchess hearing.*

At the *Pitchess* hearing, the trial court indicated it was troubled by the motion's lack of specificity, saying "your allegations are very general" and "[a]ll the [*Pitchess*] cases caution against a fishing expedition." In response, defense counsel said: "I'm not alleging physical intimidation but psychological intimidation by the fact that he was looking at a murder case and that it would be better for him if he were to cooperate with the police." Defense counsel said nothing more about an alleged threat of life imprisonment, merely arguing: "I'm just saying that there was promises of leniency in exchange for an incriminating statement." The only factual basis cited by defense counsel for this allegedly improper promise was the following portion of the interrogation transcript:

"[Howard]: Ya'll got to keep it real though, man, everything . . .

"[Detective Arciniega]: Okay, you got to keep it real too though, okay?

"[Detective McKnight]: Basically what we are doing is a credibility test. Do you know what that means?

"[Howard]: Umm . . . credibility

"[McKnight]: You are not going to be straight about certain things, you need to be straight about everything, right?

"[Howard]: Yeah.

"[Arciniega]: Ok.

"[Howard]: *That's ya'll side, what what [sic] I'm getting out of it?*

– unintelligible

"[Arciniega]: *What I say?*

– unintelligible

"[Unidentified detective]: What's the deal with (unintelligible)

"[Howard]: (unintelligible) point the finger at Leonard Jackson (unintelligible)
. . . stopping the car

"[Unidentified detective]: Tell us about it from start to . . . begin . . . what did you guys decide and how did you guys decide to do it?" (Italics added.)

Pointing to the italicized exchange between Howard and Detective Arciniega, defense counsel argued, “the implication is . . . there was some suggestion or promises of lenience to Mr. Howard which caused him to make statements not only against himself but against others.” Defense counsel asserted “there’s sufficient there to suggest that perhaps there had been other conversation prior and promises of leniency.” The trial court, however, concluded Howard’s assertion of police misconduct was “so general that I cannot see that it can be a basis, and should not, in my view, be a basis for a *Pitchess* motion.”

d. *Analysis.*

Howard asserts the trial court prejudicially erred by denying his *Pitchess* motion because “this case is virtually identical” to *People v. Memro*, *supra*, 38 Cal.3d 658. We disagree. As we will explain, because the core of Memro’s claim was that his confession had been coerced by threats of physical violence, the factual scenario he presented was sufficiently specific. Moreover, Memro could demonstrate resulting prejudice because *Pitchess* discovery was likely to have altered the outcome of his voluntariness hearing. In Howard’s case, there was no resulting prejudice.

(1) *Howard failed to present a factually specific scenario.*

The key allegation in *Memro* was that the defendant’s confession had been coerced by threats of violence. Although defense counsel’s accompanying declaration alleged Memro’s confession “ ‘came after an illegal arrest, promises of leniency, and threats of violence,’ ” the discovery sought focused on “aggressive behavior, acts of violence . . . and acts of excessive force” alleged to have been committed by the interrogating officers. (*People v. Memro*, *supra*, 38 Cal.3d at p. 680, fn. 21.) Counsel’s declaration “alleged that the information [sought] ‘would be used to show a continuing course of conduct by the South Gate Police Department which includes extraction of involuntary confessions or the attempt to extract involuntary confessions from citizens being detained or under arrest by the use of violence or attempted violence or force or threats of force, or unlawful aggressive behavior.’ ” (*Id.* at p. 681.) *Memro* held this was a sufficient good cause showing: “As counsel’s declaration in this case alleged, the

information was sought to establish the officers' habit and custom for obtaining confessions by the use of force, violence or threats. This was sufficient. Appellant was not required to specify further the details of his claim of coercion in order to obtain the requested information.” (*Id.* at pp. 683-684.)

Howard argues he, too, made the requisite good cause showing: “Counsel’s proposed defense was that the detectives used coercive interrogation techniques (such as force, threats, aggression, and false promises) and failed to respect Mr. Howard’s right to remain silent. He alleged that the detectives threatened Mr. Howard with life imprisonment, promised leniency in exchange for his cooperation, failed to respect his invocation of his right to silence, and inaccurately described in their reports their interrogations of him. Evidence that the detectives had previously employed such techniques would certainly bolster that defense, as counsel asserted to the trial court.”

But at the *Pitchess* hearing, defense counsel disavowed any claim based on “physical intimidation,” instead asserting that Howard had been subjected to “psychological intimidation.” These two kinds of intimidation are not commensurate. “Both physical and psychological pressure can lead to involuntary confessions. [Citation.] While a confession accompanied by physical violence is *per se* involuntary, [citation], psychological coercion provokes no *per se* rule. [Citation.]” (*U.S. v. Miller* (9th Cir. 1993) 984 F.2d 1028, 1031.) Howard gets no more specific than characterizing Detective Arciniega’s “What I say?” statement as “suggesting . . . a previous conversation between [Arciniega and Howard] on that issue.” But there was no need to rely on such a vague and attenuated rationale when Howard himself must have heard the alleged promise, had there been one. In this situation, the trial court properly demanded something more specific before granting *Pitchess* discovery.

The reason more specificity is necessary to support a claim of psychological coercion is because everything turns on precisely what was said and in precisely what context. Although a promise of leniency can render a resulting confession involuntary, “ ‘[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct,’ the subsequent statement will

not be considered involuntarily made.” (*People v. McClary* (1977) 20 Cal.3d 218, 228, disapproved on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn. 17.)⁹

The trial court did not abuse its discretion by denying Howard’s *Pitchess* motion.

(2) Any *Pitchess* error would have been harmless.

But even assuming, arguendo, the trial court should have granted *Pitchess* discovery, the error would have been harmless. Contrary to Howard’s arguments, his case has nothing in common with *Memro* in this regard.

In *Memro*, the defendant testified at the voluntariness hearing and gave detailed testimony accusing the interrogating officers of having physically intimidated him.¹⁰ At the *Pitchess* hearing, Memro’s attorney presented “statements by four individuals who had asserted brutality and intimidation by South Gate [police] officers during recent interrogations. In addition, counsel presented an affidavit in which the supervising public defender in South Gate indicated the absence of any ‘*Miranda* calls’ during his tenure in

⁹ The other grounds asserted in Howard’s *Pitchess* motion, which he does not reassert here, all appear to have been meritless. The trial court ultimately concluded there was no violation of Howard’s *Miranda* rights. Many other claims failed either on legal grounds or for lack of specificity. Thus, for example, the trial court held: “The suggestion that because of [Howard’s] race or gang affiliation that that would indicate something more I think is insufficient. Again it’s so general. The allegations are so general, it could apply to any case.” The police deception – falsely telling Howard his fingerprints had been found and that others had incriminated him – was not improper because “not of a type reasonably likely to procure an untrue statement.” (*People v. Farnam* (2002) 28 Cal.4th 107, 182.; see, e.g., *People v. Thompson* (1990) 50 Cal.3d 134, 167-170 [defendant falsely told his car linked to death scene by tire tracks and soil samples, and that inculpatory physical evidence had been found in his car and bedroom].) Contrary to Howard’s implied assertion, police have no duty to tape record a defendant’s interrogation. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 755, fn. 17, disapproved on other grounds by *People v. Boyd* (1985) 38 Cal.3d 762, 773; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 791, see also. *People v. Harris* (1985) 165 Cal.App.3d 324, 328 [police did not act improperly by being “selective in tape recording only the most incriminating telephone calls”].)

¹⁰ For instance, Memro testified the lead questioner impliedly threatened to smash Memro’s head through the interrogation room wall and to have a large, muscular officer beat a confession out of him.

that office.” (*People v. Memro, supra*, 38 Cal.3d at p. 674.) It was this kind of trial record that led *Memro* to conclude: “Under the facts of this case, it is reasonably probable that discovery would have led to admissible evidence of sufficient weight to affect the trial court’s determination on the voluntariness of the confession. Thus, reversal of the judgment is required.” (*Id.* at p. 685.)

There is no such trial record in the case at bar. Howard did not testify at the voluntariness hearing. The defense put on two witnesses, but they only testified about Howard’s arrest, not his interrogation. To contradict McKnight’s testimony that Howard had not been promised leniency, defense counsel could only point to that single ambiguous exchange between Howard and Detective Arciniega, and argue it “*suggest[ed] that perhaps there had been*” an unrecorded improper promise of leniency. (Italics added.) The trial court listened to the recorded portion of the interrogation, and concluded: “[N]othing I heard was coercive. In fact, I thought Mr. Howard was fairly easygoing in the interview. At one point I thought . . . he’s saying something about let’s get real or something like that, . . . so he’s almost joking around,¹¹ so I did not find it coercive”

Moreover, it appears *Memro*’s confession was the most incriminating evidence against him. Here, as demonstrated in the next section of this opinion, *infra*, even without Howard’s police statement, there was overwhelming evidence he participated in the Big Saver robbery.

Thus, we hold the trial court did not err by denying Howard’s *Pitchess* motion, and that even if it did err that error was harmless. (See *People v. Samuels, supra*, 36 Cal.4th at p. 110 [applying *Watson* test to *Pitchess* error].)

¹¹ The prosecutor had remarked earlier that “one of the most significant things on the tape as it relates to voluntariness is the defendant’s frequent laughter throughout the tape.”

2. *There was no prejudicial error in admitting Bridges's extra-judicial declarations.*

Howard contends the trial court prejudicially erred by admitting evidence of Bridges's statements to Croslin and Jackson in which Bridges implicated Howard in the Big Saver robbery. Howard asserts this evidence did not qualify as a statement against penal interest under Evidence Code section 1230 (see *People v. Duarte* (2000) 24 Cal.4th 603), that it consisted of testimonial statements in violation of the federal confrontation clause (see *Davis v. Washington* (2006) 547 U.S. ---- [126 S.Ct. 2266, 165 L.Ed.2d 224]; *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177]), and that it lacked the particularized guarantee of trustworthiness required by *Ohio v. Roberts* (1980) 448 U.S. 56 [65 L.Ed.2d 597].

There is, however, no need to address Howard's detailed claims of constitutional and evidentiary error because they are subject to harmless error analysis. Any error in admitting evidence under Evidence Code section 1230 is tested for harmlessness under the *Watson* reasonable-probability-of-a-more favorable-result standard (*People v. Duarte, supra*, 24 Cal.4th at pp. 618-619), and confrontation clause error is reviewable under *Chapman*¹² harmless-beyond-a-reasonable-doubt standard. (*People v. Ledesma* (2006) 39 Cal.4th 641, 709.)

Howard complains Bridges's hearsay declarations implicated him as *both* one of the robbers *and* as the robber who shot the security guard. Howard argues "only one eyewitness, [Jose L], came close to identifying him as a participant," and that Croslin and Jackson had not been "present in the Big Saver market during the robbery, and therefore neither had first-hand knowledge of what happened in the store." These arguments are unpersuasive.

¹² *Chapman v. California* (1967) 386 U.S. 18.

The jury *acquitted* Howard of having been the person who shot the security guard, so evidence about the precise role he played inside the market is not important.¹³ What matters is evidence showing he had been one of the robbers, and on that point there was overwhelming circumstantial evidence. Jose L., the Big Saver employee, identified Howard from a photo array two and a half years after the robbery. Although Jose's trial testimony was initially tentative, this came seven years after the robbery, and upon clarification Jose's identification was positive. Croslin testified Howard was at Hatter's house when the robbery was being planned, that he was among the group who left Hatter's house in the other two cars, and that after casing the market with Hatter, she saw Howard waiting with the rest of the robbery participants close to the market. Both Croslin and Jackson were present at Hatter's house when the robbery proceeds were being divided up. Croslin witnessed Howard bemoaning that he had shot someone. Jackson witnessed Bridges explaining to Hatter they would have gotten more money if Howard had not been "so damn trigger happy."

Given this overwhelming evidence that Howard participated in the Big Saver robbery, any error in admitting evidence of Bridges's extra-judicial statements was harmless beyond a reasonable doubt. (See *People v. Ledesma*, *supra*, 39 Cal.4th at p. 709 [Crawford error would be harmless beyond a reasonable doubt if merely cumulative of other evidence].)

3. *Howard's sentence does not constitute cruel and unusual punishment.*

Howard contends his sentence of life without possibility of parole constitutes cruel and unusual punishment under the federal and California Constitutions. This claim is meritless.

Howard has not demonstrated his sentence was disproportionate to his crime or to his individual culpability, or excessive when compared to the punishment imposed for more serious offenses. (See *People v. Dillon* (1983) 34 Cal.3d 441, 477-482; *In re Lynch*

¹³ Which is also why it does not matter that the hearsay evidence showed Bridges contradicting himself as to whether he actually saw Howard shoot the security guard.

(1972) 8 Cal.3d 410, 423-424.) Our Supreme Court has emphasized “the considerable burden a defendant must overcome in challenging a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment. [Citations.] While these intrinsically legislative functions are circumscribed by the constitutional limits of article I, section 17, the validity of enactments will not be questioned ‘unless their unconstitutionality clearly, positively, and unmistakably appears.’ [Citation.]” (*People v. Wingo* (1975) 14 Cal.3d 169, 174, fn. omitted.)

The length of Howard’s sentence alone does not warrant relief. (See *Harmelin v. Michigan* (1991) 501 U.S. 957 [115 L.Ed.2d 836] [mandatory LWOP sentence for possessing more than 650 grams cocaine did not violate Eighth Amendment].)

Howard’s reliance on *People v. Dillon*, *supra*, 34 Cal.3d 441, is misplaced. Howard is “not comparable to the immature, previously nonoffending, teenager in *Dillon*. Dillon, a 17-year-old high school boy, had gone with some companions to steal marijuana from a marijuana farm. Dillon fatally shot a man who was guarding the marijuana crop. Dillon testified that he panicked and shot the victim because the man was armed, because Dillon believed he had just shot two of his friends, and because he believed the man was about to shoot him. Dillon’s companions all received minor sentences in the incident, Dillon had no prior record, and the jury had expressed some reluctance at finding Dillon guilty of first degree felony murder.” (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1146-1147.)

Howard’s crime, a well-organized, armed store invasion robbery, is not comparable to Dillon’s crime. Nor is Howard’s personal history comparable to Dillon’s. Unlike Dillon, Howard has an extensive record. Prior to this offense, he had sustained seven juvenile petitions for such crimes as vehicle theft and weapons violations. After committing the instant offense, but before his arrest, Howard committed another robbery.

“[T]he People of the State of California . . . made a legislative choice that some 16- and 17-year-olds, who are tried as adults, and who commit the adult crime of special circumstance murder, are presumptively to be punished with LWOP. We are unwilling to hold that such a legislative choice is necessarily too extreme, given the social reality of the many horrendous crimes, committed by increasingly vicious youthful offenders, which undoubtedly spurred the enactment.” (*People v. Guinn, supra*, 28 Cal.App.4th at p. 1147.)

Howard’s sentence did not constitute cruel and unusual punishment.

4. *Apprendi/Blakely error.*

Howard contends his life without possibility of parole sentence violates the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403], because the trial court relied on aggravating sentencing factors neither found true by the jury nor found true beyond a reasonable doubt. This claim is meritless.

a. *Legal principles.*

Apprendi held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.) “[T]he ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ [citation], and the judge exceeds his proper authority.” (*Blakely v. Washington, supra*, 542 U.S. at pp. 303-304.)

b. *Discussion.*

Section 190.5, subdivision (b), provides: “The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.” Howard was 17 years’ old when he robbed the Big Saver.

“We believe Penal Code section 190.5 means . . . that 16- or 17-year-olds who commit special circumstance murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life. . . . The fact that a court might grant leniency in some cases, in recognition that some youthful special circumstance murderers might warrant more lenient treatment, does not detract from the generally mandatory imposition of LWOP as the punishment for a youthful special circumstance murderer. In the first instance, therefore, LWOP is the presumptive punishment for 16- or 17-year-old special-circumstance murderers, and the court’s discretion is concomitantly circumscribed to that extent.” (*People v. Guinn*, *supra*, 28 Cal.App.4th at pp. 1141-1142.) Section 190.5, subdivision (b), “provides a presumptive penalty of LWOP for a 16 or 17-year-old special circumstances murderer, ‘or, at the *discretion of the court*, 25 years to life.’ (Italics added.) Penal Code section 190.5 does not involve two equal penalty choices, neither of which is preferred. The enactment by the People evidences a preference for the LWOP penalty. In addition, the statutory language expressly provides that any exercise of discretion to impose the more lenient penalty is to be performed *by the court*, and not by a jury.” (*People v. Guinn*, *supra*, at p. 1145.)

We agree with the Attorney General that “[t]he trial court’s decision not to *reduce* appellant’s presumptive LWOP sentence to a term of 25 years to life under section 190.5 did not implicate the concerns of *Blakely*.” “[T]he trial court’s discretionary decision not to depart *downward* from appellant’s presumptive [life without possibility of parole]

sentence did not implicate *Blakely*'s concerns about increasing punishment based on judicial factfinding."

5. *Trial court imposed an unauthorized parole revocation fine.*

Howard contends the trial court erred by imposing a parole revocation fine under section 1202.45 because he was given a term of life without possibility of parole and, therefore, his sentence does not include a period of parole. The Attorney General properly concedes this claim has merit.

Section 1202.45 provides: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine shall be suspended unless the person's parole is revoked."

People v. Oganessian (1999) 70 Cal.App.4th 1178, held that where one of the terms imposed on a defendant was for life without possibility of parole, the trial court did not err by declining to impose a parole revocation fine "because the sentence does not presently allow for parole and there is no evidence it ever will" (*Id.* at p. 1185; accord *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) *Oganessian* reasoned the legislative purpose of restitution fines is to recoup "from prisoners and potentially from parolees who violate the conditions of their parole some of the costs of providing restitution to crime victims," but given there is only the slimmest chance anything would be recouped from a defendant sentenced to a term that prohibited parole, "there is no evidence the Legislature intended that its cost recoupment purposes were to apply under such an extremely limited set of circumstances." (*People v. Oganessian, supra*, at pp. 1184, 1185.)

We will order the parole revocation fine vacated.

DISPOSITION

The judgment is affirmed as modified. The parole revocation fine shall be vacated. In all other respects, the judgment is affirmed. The clerk of the superior court shall prepare an amended abstract of judgment to reflect this modification, and forward the amended abstract of judgment to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.